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No. 91-1600

In the
Supreme Court of the United States

OCTOBER TERM, 1991

HAZEN PAPER COMPANY, ET AL.,
PETITIONERS,

v.

WALTER F. BIGGINS,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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I. STATEMENT OF THE CASE

A. The Case Below

This action was originally filed in the district court of Massachusetts in February 1988. The plaintiff, Walter Biggins, was terminated from his employment by the defendant, Hazen Paper Company, and alleged in his complaint violations by

Hazen Paper Company, Thomas Hazen and Robert Hazen (collectively hereinafter Hazen), of the ADEA, 29 U.S.C. §§ 621, et seq. The Age Discrimination in Employment Act, ERISA 29 U.S.C. §§ 1001, et seq. Employee Retirement Income Security Act, the Massachusetts Civil Rights Act M.G.L. c. 12, § 11I, breach of contract, fraud, conversion and wrongful discharge.

The case was tried for five days to a jury which found that the defendants willfully violated the ADEA, violated ERISA, committed fraud, breached plaintiff's employment contract, and wrongfully discharged him [1] (Pet. App. 51-52).[2] As a result of the jury's finding of willfulness, the district court awarded liquidated damages in the ADEA claim (Pet. App. 52).

The district court (Freedman, C.J.) subsequently issued a post trial Memorandum and Order allowing the defendants' motion for judgment notwithstanding the verdict on the finding of willfulness and on the Massachusetts Civil Rights Act claim. The remainder of the jury's verdict was upheld (Pet. App. 50-80). The district court also awarded the plaintiff attorneys' fees and expenses, but denied the plaintiff 's request to enhance the attorneys' fees award due to the contingent nature of the fee arrangement (Pet. App. 80-87).

Both parties filed appeals to the United States Court of Appeals for the First Circuit. On January 8, 1992, the First Circuit issued its decision affirming the judgment on the ADEA

[1] Damages assessed were as follows:

ADEA	$560,775.00
ERISA	$100,000.00
Fraud	$315,000.00
Breach of Contract	$266,897.00
Wrongful Discharge	$ 1.00

[2] References are as follows:

Petition for Writ of Certiorari	Pet.
Petitioner's Appendix	Pet. App.
Appendix for the First Circuit Court of Appeals	C.A. App.

finding and overturning the district court's reversal of the jury's finding of willfulness. The Court affirmed the findings on the violation of ERISA, fraud and wrongful discharge, but reversed the judgment in favor of Biggins for breach of contract (Pet. App. 3-49).

The evidence at trial showed that Biggins was employed by the defendants from 1977 to June of 1986 as their technical director (C.A. App. 458). Hazen Paper Company is a "paper converter" located in Holyoke, Massachusetts (C.A. App. 290-291). The company applied decorative coatings to paper for use in cosmetic wrap, lottery tickets and pressure sensitive labels (C.A. App. 290-291). The company was owned by the defendants Thomas and Robert Hazen, and at the time of Biggins' arrival in 1977, it had $8,994,000.00 of gross annual sales (C.A. App. 1410).

During Biggins' tenure at the company, he developed several products, the most significant of which came to be known as the "Biggins' Acrylic." (C.A. App. 323-325.) When Biggins arrived, the company was using nitrocellulose and vinyl coatings which produced hazardous emissions which had to be eliminated due to the mandates of the Clean Air Act (C.A. App. 307-309). Working on his own, and often at home, Biggins developed a water based acrylic that exceeded the requirements of the environmental laws and produced a superior product (Pet. App. 11). The product became widely used, and company sales increased dramatically (C.A. App. 639, 679). By the time of trial, Hazen Paper Company's annual sales were over $40,000,000.00 (C.A. App. 1276, 1304, 1410).

Citing the success of his invention, and his other achievements, Biggins sought increased compensation from the company (Pet. App. 11). Thomas Hazen told Biggins that he could not meet Biggins' request for a $100,000 per year salary in cash, but promised he would instead give Biggins a "piece of

the company" in stock, making up the difference between his base salary and $100,000 with the stock (C.A. App. 349). Biggins accepted. The stock was never provided and Biggins' requests were put off (C.A. App. 350, 356, 470). In the spring of 1986, Robert and Thomas Hazen confronted Biggins and accused him of disloyalty to the company, claiming he was involved in two businesses with his son (C.A. App. 357-361). Biggins responded that the Hazens had given prior approval to his activities which were limited to advising his son (C.A. App. 362-363). He further pointed out that one of the businesses had not operated for two years, neither had ever made any money, and the businesses did not compete with Hazen (C.A. App. 362-370). The Hazens demanded Biggins sign an agreement which included a burdensome non-compete clause, and confidentiality covenants (C.A. App. 1138-1142). None of the younger employees in Biggins' department were required to sign such an agreement (C.A. App. 373). Biggins requested the compensation arrangement set up by Thomas Hazen be incorporated in any agreement (C.A. App. 374-378). The Hazens refused, however Biggins' younger successor was given these benefits in his agreement, with a covenant not to compete that encompassed one quarter of the time required of Biggins, and the successor was to be compensated while he did not compete, unlike Biggins who would not be compensated during the term of his non-compete (C.A. App. 775, 779, 1501-1508). Biggins was told to sign (on the eve of his pension benefits vesting) or be terminated. When he refused, Thomas Hazen fired Biggins (C.A. App. 377-378).

B. Errors in the Petition

The petitioners erroneously assert that "the uncontradicted evidence showed that Biggins acted contrary to prior assurances" he had given the Hazens, and that Biggins had been

marketing services he performed for Hazen to competitors. This assertion was specifically disputed at trial by evidence presented by Biggins and others. That evidence confirmed that these were business ventures of his son which Biggins aided in a minor way, with the permission of Thomas Hazen and from which he received absolutely no benefit or reward (C.A. App. 688-689, 390-395, 793-794). Clearly, the jury resolved this factual dispute in favor of Biggins.

The Hazen petition erroneously seeks to create the impression that Biggins' assertion of age discrimination and the opinions of the district court and the First Circuit were based solely on the plaintiff's pension status as a "proxy" for age discrimination (Pet. 14). In fact, Biggins presented a whole range of factors which demonstrated intentional age discrimination on the part of the defendants: disparate treatment of the plaintiff in employment terms as compared to younger members of his department and his younger successor, the insistence (causing his termination) that he sign an agreement detrimental to someone his age, the attempt to strip Biggins of his pension rights at age sixty-two on the eve of vesting, together with forfeiture of his health, life and disability insurance, while seeking to retain him as a consultant, and specific age related remarks directed at Biggins. The Hazens tried to cover up their misconduct by filing a statement under oath with the Massachusetts Department of Employment and Training, claiming that Biggins had voluntarily left the company (C.A. App. 533-535, 1352). Petitioners also create the inaccurate impression that the district court relied solely on Biggins' pension status in finding age discrimination. The district court specifically stated that the evidence of age discrimination included disparate treatment with younger employees in terms of the trade secret and confidentiality agreement, disparate treatment in the terms of employment with his thirty-five year old successor (Pet. App. 55), termination on the eve of his pension vesting, (as *evidence*

of age discrimination and not as a proxy for age itself) (Pet. App. 55), defendants' knowledge of this status (Pet. App. 56), and specific age related remarks on insurance and health matters by the Hazens (Pet. App. 56). The district court also specifically cited as further evidence of age discrimination, the attempt to retain Biggins' services as a consultant without key benefits such as life, health and disability insurance, provided to all younger employees (Pet. App. 56).

The petitioners are also erroneous in their description of the First Circuit's reliance on pension status as being the sole grounds or proxy for age discrimination: the First Circuit specifically cited the same factors noted above by the district court, further noting that Thomas Hazen testified that he was absolutely aware that age discrimination was illegal (Pet. App. 12-14).

The facts placed in evidence, therefore, involved multiple actions and factors amounting to intentional age discrimination, and not a single factor as a proxy for it.

II. REASONS FOR DENYING THE PETITION

A. THIS PETITION DOES NOT PRESENT ANY IMPORTANT QUESTION OF FEDERAL LAW TO BE RESOLVED BY THIS COURT

1. This Case Does Not Present a Proper Occasion to Readdress the Court's Established Definition of Willfulness

Petitioner argues that the First Circuit's decision with respect to willfulness under the ADEA should be reversed by this Court on grounds that it "disserves" Congressional intent and conflicts with decisions of other Circuit Courts. This case does not present such a situation. Here the First Circuit directly applied the applicable Supreme Court precedent for defining willfulness, which is not erroneous in the circumstance of an

individual discrimination case. Secondly, to whatever extent a conflict among the Circuit Courts may exist on this issue, it is analytically insubstantial, and this case does not present an appropriate opportunity to resolve the question, because the same result would be reached regardless of which willfulness standard was applied. Consequently, the treatment of these cases does not conflict in any intolerable way, so as to require the intervention of this Court.

First, the petitioners misstate the holding of the First Circuit as to willfulness, stating that the First Circuit's opinion will lead to double damages in every case of discriminatory treatment and that it gives life to the "awareness of the ADEA in the picture" standard, rejected by the Court in *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985). In fact, the First Circuit's opinion, plainly and directly follows the dictates of this Court set down in *Thurston* and again (under the Fair Labor Standards Act) in *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128 (1988), stating "we therefore adopt, without modification or qualification, the *Thurston* test for willfulness." (Pet. App. 20.)

This standard does not create willfulness in every individual case as petitioners state. First, not all individual cases are disparate treatment cases. Indeed in this very case petitioners in their second question presented, treat this case as a disparate impact case (see below). Secondly, under this test, the employer always has the defense of lack of knowledge of the law's requirements and good faith, (e.g. reliance on opinion of counsel) defenses for which the employer in this case offered no evidence. Not protected under the *Thurston* standard is the employer, who, knowing age discrimination is illegal, acts to intentionally discriminate against an individual on the basis of age. There is absolutely no reason to believe that in such a case Congress did not fully intend for such an employer to suffer additional liability in the form of liquidated damages.

The petitioners further incorrectly suggest that the First Circuit's decision somehow raises the specter of the standard for willfulness (once adhered to by some Circuit Courts under the FLSA (29 USC § 216)) of "awareness of the ADEA being in the picture." See *Coleman* v. *Jiffy June Farms*, 458 F.2d 1139 (5th Cir. 1971), *cert. denied*, 409 U.S. 948 (1972). The First Circuit's opinion adheres strictly to *Thurston*, and *Thurston* alone, and it was the *Thurston* decision which rejected the "in the picture" standard. *Trans World Airlines* v. *Thurston*, 469 U.S. at 128. It is a matter of common sense that if an individual, knowing that age discrimination is illegal, then acts to discriminate against someone on the basis of their age, he or she is acting knowingly and intentionally in violation of the Act and is not merely the victim of the existence of an indiscernible statute.[3]

Ironically, the petitioners assert (with respect to the second question presented), that this is not a disparate treatment case at all.[4]

Petitioner asserts that the writ should be granted because of a conflict among the Circuit Courts as to the definition of willfulness in a disparate treatment case. This case, however, does not present an appropriate vehicle for resolving such conflict, if indeed one exists at all, since Biggins would prevail under any of the standards utilized in the various Circuit Courts.

The Circuit Court decisions at issue fall into three categories: those requiring "outrageous" or "egregious" conduct, *Dreyer*

[3] Petitioners footnote 7 also implies some significance to the fact that *one* defendant acknowledged he knew age discrimination to be illegal. That "one defendant" was Thomas Hazen who owned 2/3 of the company stock, was Biggins' direct supervisor and the person who terminated him. (C.A. App. 377-378).

[4] Petitioner argues that the underlying ADEA case should be reviewed by this Court because the First Circuit created a "per se rule equating pension status with age" (Pet. 14) and thereby used a neutral factor as a proxy for age (Pet. 14-16). This argument effectively asserts that this is a disparate impact case.

v. *Arco Chemical Co., Div. of Atlantic Richfield Co.*, 801 F.2d 651, 658 (3d Cir. 1986), *Hansard* v. *Pepsi Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1470 (5th Cir.), *cert. denied*, 493 U.S. 842 (1989), those requiring that there be "direct evidence" of age discrimination, *Neufeld* v. *Searle Lab*, 884 F.2d 335, 340 (8th Cir. 1989), and those requiring age be shown to be the "determining" or "predominant" factor. *Schrand* v. *Federal Pacific Elec. Co.*, 851 F.2d 152 (6th Cir. 1988), *Cooper* v. *Asplandh Tree Expert Co.*, 836 F.2d 1544, 1551 (10th Cir. 1988). The majority of Circuits, as did the First Circuit here, contrary to the petitioners' assertion, follow the plain *Thurston* standard without elaboration (although the Second Circuit "continuum" analysis agruably differs to a slight degree). See *Benjamin* v. *United Merchants and Mfrs., Inc.*, 873 F.2d 41, 44 (2d Cir. 1989), *Taylor* v. *Home Ins. Company*, 777 F.2d 849, 859 (4th Cir. 1985), *cert. denied*, 476 U.S. 1142 (1986), *Brown* v. *M&M/Mars*, 883 F.2d 505, 512 (7th Cir. 1989), *Gilchrist* v. *Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1494-95 (9th Cir. 1986), *Formby* v. *Farmers and Merchants Bank*, 904 F.2d 627, 632 (11th Cir. 1990).

Biggins presented evidence that would have met any of these tests. There was evidence that age was in fact both the predominant and determining factor in his discharge, given that, as the First Circuit noted, age was inexorably tied up in the decision to terminate him,[5] and Biggins presented evidence

[5] As argued below, Biggins does not accept the petitioners' assertion that the First Circuit found age discrimination solely as a result of pure pension discrimination, which could have theoretically occurred to a younger employee. The reason that the pension discrimination which occurred was most certainly also *age* discrimination is that the time of a pension to vest (and the loss of health, life and disability insurance) clearly has a greater significance to a sixty-two year old individual, than a thirty year old, who can regain pension status elsewhere. Consequently the act of forcing Biggins to sign certain agreements which were burdensome and which were not required of younger, similarly situated employees, on the eve of his pension vesting, at age sixty-two was particularly designed to take advantage of his age.

of actual disparate treatment, age based remarks, and pension and benefit discrimination.

The same is true of any requirement of "direct evidence of age discrimination:" specific age based remarks together with disparate treatment constitute direct evidence of age discrimination. As the First Circuit noted, the jury's finding of willfulness had a "solid evidentiary foundation" (A-21), and the plaintiff survived an erroneous district court jury instruction on age discrimination, which, the First Circuit noted, created a higher standard, by requiring a "bad purpose." (A-21).

Even the "outrageous" or "egregious" requirements of the Third and Fifth Circuits are met on the facts here, for the jury found the defendants' guilty of common law fraud in their failure to pay Biggins his stock: the very issue on which the defendants used Biggins' age as a negotiating weapon in the events leading up to his termination. Also, in the *Dreyer* case, the Third Circuit specifically stated that "termination of an employee at a time that could deprive him or herself an imminent pension might show the 'outrageousness' of conduct that would warrant double damages." *Dreyer* at 658. Furthermore, the Hazens, having dismissed Biggins, defrauded him of his stock and unlawfully forfeited his pension, then advised the Massachusetts Department of Employment and Training under oath that Biggins had voluntarily left their employ (C.A. App. 533-535, 1352). Clearly, the evidence in this case meets any standard for willfulness.

Analysis of these cases also demonstrates that when all of the underlying circumstances are considered, there is in fact no genuine conflict among the Circuits that either requires resolution or can be resolved by this case. This is because the apparent difference among the Circuits on defining willfulness results from different criteria for proof of the underlying age violation. The ultimate result, in terms of what a plaintiff must prove to show a willful violation of the act, does not differ

significantly. This can be seen from comparing the First Circuit standards for proof of an underlying age violation with those in Circuits with a different definition of willfulness.

In the First Circuit, once an age plaintiff has made out a prima facie case and the employer has articulated a legitimate reason for its action, the plaintiff then has a burden of proving that the legitimate reason was not just false or a pretext, but a pretext for *age* discrimination, i.e. the plaintiff must show "a discriminatory motive based on age." *Connell* v. *Bank of Boston*, 924 F.2d 1169, 1172 (1st Cir.), *cert. denied*, 111 S.Ct. 2828 (1991), *Mesnick* v. *General Electric*, 950 F.2d 816 (1st Cir. 1991), *Medina-Munoz* v. *R.J. Reynolds Tobacco Co.*, 896 F.2d 5 (1st Cir. 1990). However, those Circuits which have adopted an elevated standard of willfulness and which have ruled on this issue of pretext, have adopted a less stringent standard of proof for the underlying ADEA case than has the First Circuit.

The Third Circuit, for instance, has held that where a plaintiff demonstrates that the proffered reasons for the action are pretextual, because of inconsistencies and implausibilities, summary judgment must be denied. *Sorba* v. *Pennsylvania Drilling Co., Inc.*, 821 F.2d 200 (3d Cir. 1987), *cert. denied*, 484 U.S. 1019 (1988), and *see Duffy* v. *Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393 (3d Cir.), *cert. denied*, 469 U.S. 1087 (1984).

The Fifth Circuit holds that evidence used to prove a prima facie case can be used to sustain the presumption on the issue of pretext. *Reeves* v. *General Foods Corp.*, 682 F.2d 515 (5th Cir. 1982).

The Eighth Circuit holds that the employee's submission of a discredited explanation is sufficient evidence of discrimination. *MacDissi* v. *Valmont Industries*, 856 F.2d 1054 (8th Cir. 1988), Accord *Brooks* v. *Munroe System*, 874 F.2d 202 (8th Cir.), *cert. denied*, 110 S.Ct. 153 (1989).

The Tenth Circuit likewise holds that casting doubts on the employers cited reasons is sufficient. *E.E.O.C.* v. *University of Oklahoma*, 774 F.2d 999 (10th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986).

This is consistent with the First Circuit's observation here, that, at least with respect to some apparently differing tests for willfulness, the required ingredient for willfulness was already included in the proof of the underlying claim (Pet. App. 20). Biggins in fact presented evidence sufficient to satisfy any of the standards in question. The claim that conflict exists among the Circuit Courts on willfulness results not so much as from a disagreement over what should constitute willful violations, as from differing analyses of the case as a whole and, in particular, the underlying ADEA violation. Resolution of this problem would require the Court to address the additional question of what is sufficient proof of the underlying ADEA violation: an issue not presented by this case, since Biggins presented evidence which satisfies any test for an underlying violation. In any event, although not all Circuit Courts have addressed both the underlying proof issue and the willfulness issue, it seems likely that in all Circuit Courts, where an individual shows intent to discriminate on the basis of age, together with knowledge of age discrimination's illegality, willfulness will be found. Whatever conflict that exists among the Circuit Courts therefore, could not be adequately resolved in this case, particularly with its complex fact pattern (including acts of common law fraud) which is unlikely to appear in most ADEA cases. See *Sommerville* v. *United States*, 376 U.S. 909 (1964) (certiorari denied where resolution of the conflict would not change the outcome below).

It should be noted as well, that this Court has in this term denied certiorari on this same issue in *American Ass'n of Retired Persons, Inc.* v. *Farmers Group Inc.*, 943 F.2d 996 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 937 (1992), and has previously denied certiorari in *Verbraeken* v. *Westinghouse Elec. Corp.*, 881 F.2d 1041 (11th Cir. 1989), *cert. denied*, 493 U.S. 1064 (1990). In addition, none of the Circuit Court decisions at issue ever reached an en banc panel, and, in this case, a request for hearing en banc was denied.

B. THERE ARE NO GROUNDS FOR REVIEWING THE FIRST CIRCUIT'S DECISION ON ADEA LIABILITY

Petitioners argue that the lower courts' decisions regarding liability in the underlying ADEA claim should be reviewed on grounds that the First Circuit created a *per se* rule equating interference with pension vesting and age discrimination, which allegedly conflicts with a decision of the Seventh Circuit in *Wheeldon* v. *Monon Corp.*, 946 F.2d 533 (7th Cir. 1991).

The petitioners erroneously assert the creation of such a *per se* rule in this case, and erroneously asserted the existence of a conflict among the Circuits.

As plaintiff has noted above, this is most certainly not a case involving pure pension discrimination or interference with pension vesting, nor was it so treated by the First Circuit or the district court. Both courts specifically referenced disparate treatment from younger members of his department, disparate treatment from his thirty-five year old successor, termination on the eve of pension vesting, specific age related remarks on insurance and health, and the attempt to retain Biggins as a consultant without the benefits provided to younger employees. Therefore, this action involved numerous items of evidence, indicative of intentional age discrimination, one of which involved Biggins' pension status. However, it is not Biggins' pension vesting status *per se* that was the source of age discrimination, but rather the context in which it arose: that of a

sixty-two year old, hours away from having his pension vest, at a time and an age where he would obviously not have an opportunity to vest in another pension, despite the likely need, *given his age*, for such protection. The pension discrimination in this case was evidence of age discrimination, not the age discrimination in and of itself. The district court analyzed the case in precisely this manner, citing, *Visser* v. *Packer Engineering Associates, Inc.*, 924 F.2d 655 (7th Cir. 1991), and *Benjamin* v. *United Merchants and Mfrs., Inc.*, 873 F.2d 41 (2d Cir. 1989) (A-44). Likewise, the First Circuit described all of the evidentiary factors related to age discrimination, and stated that not only could the jury conclude there was a decision to fire Biggins before his pension vested, but that "the jury could also have reasonably found that age was inextricably intertwined with the decision to fire Biggins." (A-14).

To the extent pension was significant in this case, it was significant *because* of Biggins' age. This is not therefore a case where pension was a proxy for age, as the petitioners allege.

The further assertion that the First Circuit's decision creates a conflict among the Circuit Courts is also erroneous. Petitioners cite *Wheeldon* v. *Monon Corp.*, 946 F.2d 533. *Wheeldon* did not involve the same issue. There, an individual claimed he had been terminated because he already possessed a *military* pension from the United States (not his employer), and that he, therefore, was regarded by his employer as more easily expendable because of his other source of income, and consequently was terminated based on a factor arguably related to age. *Wheeldon*, 946 F.2d at 536. This is a far cry from the present case which involves the company's own pension plan, which it controlled, (C.A. App. 957-960) and where Biggins' pension status was one of several factors tied in with his age that led to his termination.

Therefore, this case in no way presents an important question of federal law erroneously decided, or an intolerable conflict among the Circuit Courts.

CONCLUSION

For the reasons cited above, the petition for Writ of Certiorari should be denied.

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